

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
	)	
Electronic Delivery of MVPD	)	MB Docket No. 17-317
Communications	)	

**JOINT COMMENTS OF DIRECTV, LLC AND DISH NETWORK L.L.C. IN  
RESPONSE TO PUBLIC NOTICE**

AT&T Services Inc., on behalf of its affiliate DIRECTV, LLC (“DIRECTV”), and DISH Network L.L.C. (“DISH”) respectfully submit these joint comments in response to the Commission’s Public Notice in the above-captioned proceeding.<sup>1</sup> The Notice seeks comment on the December 7, 2018 proposal filed by NCTA and NAB to update carriage election procedures between cable operators and broadcasters (the “Joint Proposal”).<sup>2</sup> As proposed, beginning in 2020, a broadcaster would provide a carriage election notice via email to a cable operator *only if* the station is changing its carriage election. According to the parties, adopting this proposal will “alleviate the burdens with the current notification process and meet the needs of both broadcasters and cable operators.”<sup>3</sup>

DIRECTV and DISH support the Commission’s media modernization efforts and have no objection to the Commission adopting the Joint Proposal for cable operators. However,

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<sup>1</sup> Media Bureau Seeks Comment on Industry Proposal for Carriage Election Notice Modernization, *Public Notice*, MB Docket No. 17-317 (rel. Dec. 13, 2018) (“Notice”).

<sup>2</sup> Letter from Rick Chessen, Senior Vice President, Legal and Regulatory Affairs, NCTA, and Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB to Michelle Carey, Chief, Media Bureau, MB Docket Nos. 17-317, 17-105 (filed Dec. 7, 2018) (“Joint Proposal”).

<sup>3</sup> *Id.* at 2.

DIRECTV and DISH oppose extending the Joint Proposal to direct broadcast satellite (“DBS”) operators. Among other reasons, there are differences between the way the Commission’s carriage election rules work for cable and DBS operators that are not accounted for by the Joint Proposal and raise significant concerns for DBS operators.

Indeed, NCTA and NAB do not purport to address DBS providers’ concerns with this proposal, nor do they claim that this proposal would “meet the needs” of DBS providers. In fact, neither association consulted with DIRECTV or DISH, the nation’s two DBS providers, on this proposal. As explained below, applying the Joint Proposal to DIRECTV and DISH will impose significant administrative burdens on these operators, which is particularly unjustified given that it is the broadcasters that are benefiting from the government granted right of carriage, not the DBS operators. If the Commission chooses to move forward updating the carriage election procedures for DBS operators, it should do so consistent with the proposal put forth by DISH and endorsed by DIRECTV.<sup>4</sup>

#### **I. THE DIFFERENCES BETWEEN CABLE OPERATORS AND DBS PROVIDERS WARRANT MAINTAINING THE CURRENT DBS CARRIAGE ELECTION PROCEDURES**

DIRECTV and DISH support the Commission’s efforts to streamline and update its media regulations. But, for reasons we detailed in our previous filings, we do not believe that any changes to the current election process for DBS carriage are necessary.<sup>5</sup> If the Commission nonetheless makes any changes, it must not increase burdens that fall to DBS operators during an election cycle and it should ensure that any new rules provide the same level of certainty that the

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<sup>4</sup> See Comments of DISH Network L.L.C., MB Docket Nos. 17-317 and 17-105 (Feb. 15, 2018); Reply Comments of AT&T, MB Docket Nos. 17-317 and 17-105 (Mar. 5, 2018).

<sup>5</sup> *Id.* See also Comments of AT&T, MB Docket Nos. 17-317 and 17-105 (Feb. 15, 2018).

current process provides. The Joint Proposal fails to take into account the differences between cable and DBS operators and, if extended to DBS providers, will not satisfy these goals.

Cable operators and DBS providers are not similarly situated when it comes to the Commission's carriage election rules. For example, commercial broadcasters are currently required to send carriage election notices to the thousands of cable systems if they desire carriage via *retransmission consent*. With that backdrop, it is understandable that NAB and NCTA would seek to streamline the carriage election procedures applicable to cable operators. Nexstar alone stated that it sent over 6,500 certified letters to cable systems during the last election cycle.<sup>6</sup> As NAB explained, the "clear majority of commercial stations elect retransmission consent, and the number is likely to increase in the future."<sup>7</sup> By contrast, a commercial broadcaster that desires retransmission consent carriage on a DBS system would *not* send an election letter since the carriage default for DBS providers is retransmission consent. And, if that broadcaster desires *mandatory carriage* on DIRECTV's and DISH's systems, it need only send *two* letters once every three years.

As a practical matter, even though the Joint Proposal does not address the different election defaults between cable and DBS providers, it effectively is bringing the rules applicable to commercial broadcasters electing on cable systems in line with the current DBS rules. As proposed, once a commercial broadcaster elects retransmission consent with a cable system, it need not submit a subsequent re-election notice unless it desires mandatory carriage on the cable system. This is essentially the existing satellite regime, whereby a commercial broadcaster that

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<sup>6</sup> See, e.g., Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 17-317 and 17-105, at 3 (Feb. 15, 2018).

<sup>7</sup> Comments of NAB, MB Docket Nos. 17-317 and 17-105, at 5 (Feb. 15, 2018) ("NAB Comments").

does not send a mandatory carriage notice to a DBS provider by the election due date defaults to carriage via retransmission consent.

**A. Nationwide DBS Providers Have a Greater Need for Election Notices Than Cable Operators and Mailing *at Most* Two Letters Once Every Three Years to DBS Providers Is Not Burdensome.**

During the triennial election cycles, stations may change content, ownership, and sometimes locations, and thus do not always want and are not always eligible for continued mandatory carriage on a DBS provider's platform. Cable operators have a local or, at least, a regional presence and are thus more aware of and familiar with these station changes during an election cycle. But, that is not true for nationwide DBS providers. DBS providers use these triennial election notices to update records and determine carriage obligations for the next three years, which helps them to manage the scarce space on capacity-constrained spot beams. A DBS provider obtains similar updated station information from its retransmission consent stations through the agreement renewal process. Absent the mandatory election notice every three years, DBS providers may never have any contact with mandatory carriage stations.

NAB's members have complained about the challenge of identifying which cable systems serve which communities and designated market areas, and where to mail election notices to ensure that they reach the "each cable system," given that there are thousands of cable systems.<sup>8</sup> As noted above, there are just two nationwide DBS providers and that has been the case for over two decades. Broadcasters are familiar with where to mail their mandatory carriage election letters to these two providers, as this information has remained stable over the years. This stability is in stark contrast to changing cable system information as cable operators continue to consolidate. The steady consolidation in the cable industry has likely exacerbated

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<sup>8</sup> *Id.* at 4-5.

broadcasters' efforts to mail timely election notices to cable systems as they must research and send notices to different individuals at different addresses, and at different companies nearly every election cycle.

Finally, no party has explained – or even attempted to explain – how mailing, at most, two letters once every three years (in exchange for free carriage on DBS providers' systems) is burdensome. For reasons described herein, the benefit to DBS providers of maintaining the status quo regarding triennial election notices for mandatory carriage far outweighs any slight inconvenience of mailing one letter during a three-year period to obtain valuable carriage on a DBS platform.<sup>9</sup>

**B. The Joint Proposal's Email and Phone Call Procedures Are Not Workable for DBS Providers.**

NCTA and NAB propose to dispense with carriage election notice letters sent via certified mail in favor of emailed carriage election notices. Under the Joint Proposal, when a broadcaster emails its carriage election notice to a cable operator, the operator “should generate a response to the broadcaster’s notification email.”<sup>10</sup> The Joint Proposal requires broadcasters to call a cable operator’s “designated phone number to receive assistance and confirmation that the notice was received” in the event that they do not receive such response.<sup>11</sup> In addition, NCTA and NAB propose that a broadcaster copy a Commission email address during its carriage election transmission to “serve as a backup for broadcasters to show that they successfully completed proper notice.”<sup>12</sup>

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<sup>9</sup> AT&T has supported election notice delivery via commercial or U.S. Postal Service express delivery mail with tracking. AT&T Comments at 5-6.

<sup>10</sup> Joint Proposal at 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Again, DISH and DIRECTV have no objection to the Commission adopting this proposal for cable operators, but we oppose extending these proposed email and phone call procedures to DBS providers. As the Commission understands, DBS providers are nationwide, and each carries more than 1,300 broadcast stations. It is not feasible for DISH and DIRECTV to manage that number of carriage election notifications through emails and phone calls. Ultimately, applying this proposal to DBS providers unfairly shifts too many burdens to them.

Among other things, email delivery introduces several complexities that could impact the receipt of the notices (for example, corporate spam filters or typos in the delivery addresses). There is no way to ensure that such notices are sent and received on time when using email delivery. The Joint Proposal's attempt to alleviate these concerns only increases the burdens on DBS providers, without providing us with the certainty necessary in the carriage election process. As an initial matter, if a broadcaster's election email gets caught in a DBS provider's spam filter, one of two things will happen: either the broadcaster will not receive an acknowledgement of receipt (in which case the broadcaster will follow-up with a phone call under the Joint Proposal's process) or the broadcaster will receive an automatically generated acknowledgement of receipt even though DBS personnel did not receive the notice. Both outcomes are problematic for DBS providers. With each carrying more than 1,300 broadcasters, it would introduce unnecessary operational challenges to require DBS operators to manage, track, and respond to all the phone calls from broadcasters in the event they do not receive an acknowledgement of receipt. Even if DISH's and DIRECTV's systems were to generate an automatic acknowledgement of receipt, that does not mean that their respective personnel successfully received these emails due to corporate spam filters.

Further, while the Joint Proposal would require broadcasters to copy the Commission on any election notices they send, it does not outline if or how the Commission will resolve disputes that arise from the election process. Given the “significant legal and financial consequences”<sup>13</sup> that arise from failing to make a timely election notice, email delivery introduces too many vulnerabilities in the system for DBS providers that could disadvantage both parties, making it an insufficient method to modernize the carriage election process. Additionally, DIRECTV and DISH remain concerned about disputes over which carriage election request controls if the broadcaster submits multiple requests. This is not uncommon; NAB acknowledges that its members “routinely” submit duplicate carriage election notices.<sup>14</sup> These multiple notices are burdensome in that DBS providers must review each notice and follow-up with the broadcaster when there are differences between the broadcaster’s notices. This problem will only worsen for DBS providers with the ease of sending email notices.

## **II. THE COMMISSION NEED NOT HAVE IDENTICAL CARRIAGE ELECTION PROCEDURES BETWEEN CABLE AND DBS PROVIDERS**

That cable and DBS providers may have different carriage election procedures is not a sufficient basis to extend the Joint Proposal to DIRECTV and DISH. There are historical and statutory reasons supporting the differences between the two classes of video providers. For example, the carriage election defaults are different, with significantly different consequences. In 2000, the Commission established a different default rule for DBS providers after correctly finding that the cable default of mandatory carriage is inconsistent with section 338(a)(1)’s

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<sup>13</sup> Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative, *Notice of Proposed Rulemaking*, 32 FCC Rcd 10755, ¶ 26 (2017).

<sup>14</sup> NAB Comments at 6.

requirement that DBS providers carry broadcasters only “upon request.”<sup>15</sup> This is also the reason why noncommercial educational stations must file carriage election letters every election cycle with DBS providers, but not with cable systems. And, as explained above, there is a real and practical need for mandatory carriage stations to file new election notices every three years with DBS operators.

### **III. THE JOINT PROPOSAL LEAVES MANY CRITICAL QUESTIONS UNANSWERED FOR DBS PROVIDERS**

As discussed above, the Joint Proposal will unnecessarily burden DBS providers. In addition, given the differences between the election procedures on cable and DBS systems, the Joint Proposal raises several practical questions about how broadcasters will elect carriage on DBS systems.

For example, under the Joint Proposal, a broadcaster will provide notice via email beginning in 2020 *only if* the station is changing its carriage election. But, the Joint Proposal says nothing about the timelines associated with these elections. Will a broadcaster be able to change its election *at any time* after 2020, thus causing the three-year election cycles to effectively disappear? Will the timelines associated to responding to carriage requests stay in place? These questions are critical given the capacity constraints on DBS systems. The current timelines and three-year election cycles give DBS providers the opportunity to plan for their mandatory carriage obligations. Providing broadcasters with the ability to assert mandatory carriage *at any time* would significantly burden DBS providers.

In addition, as noted above, what role will the Commission play in refereeing disputes between broadcasters and DBS operators over proper elections? The Joint Proposal’s attempt to

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<sup>15</sup> See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, 16 FCC Rcd 1918, ¶ 22 (2000).



provide certainty via the email election process only increases the burdens for DBS providers, without providing a real framework for assuring that notices are actually sent and received. And, the Joint Proposal seeks to inject the Commission into the process, without providing any details about how the Commission may resolve such disputes.

#### IV. CONCLUSION

DIRECTV and DISH support the Commission's media modernization efforts and have no objection to the Commission adopting the Joint Proposal for cable operators. However, given the differences between the election process for cable and DBS providers, the Joint Proposal is not workable for DBS providers and we object to its application. If the Commission chooses to move forward updating the carriage election procedures for DBS operators, it should do so consistent with the proposal put forth by DISH and endorsed by DIRECTV.

Respectfully submitted,

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